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The user principle: Rashomon effect or much ado about nothing?

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THE USER PRINCIPLE

Rashomon Effect or Much Ado about Nothing?

The underlying basis of an award of damages according to the user principle is the subject of intense and heated debate. The main debate concerns whether such awards are compensatory or restitutionary. Whilst more complex theories exist including mixed compensatory/restitutionary accounts, it is proposed that at the heart of the debate lies a dispute over the law's conception of gain and loss. Should gains and losses be narrowly or broadly conceived? It is suggested that the cases are only consistent with a broad conception of both since some cases would be inexplicable on a narrow conception of the same. If this is correct, then the restitutionary analysis, whilst theoretically plausible, would be practically unappealing to plaintiffs since on this basis, claims would be subject to defences not available to the same claim analysed purely in compensatory terms. Accordingly, it is difficult to imagine that a plaintiff would ever plead its case purely in restitutionary terms.

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I. Introduction

1 In *Stoke-on-Trent Council v W & J Wass Ltd*[1] ("*Stoke-on-Trent Council*"), Nicholls LJ opens his judgment as follows:[2]

> It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property.

* The author would like to thank the editor for this volume, Prof Elise Bant, for her very helpful comments on an earlier draft. The usual caveat applies.

1 [1988] 1 WLR 1406.

2 *Stoke-on-Trent Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1416.

Christened the "user principle" by his Lordship in the same case,[3] its underlying basis has been and remains the subject of intense debate. Are damages awarded on the basis of the user principle awarded on a compensatory basis or a restitutionary basis? It will be seen that courts' and commentators' views of whether such awards are compensatory or restitutionary turn on their perspectives of what the words "loss" and "gain" mean in the law. It may thus be an instance of the occurrence of what has been termed the *Rashomon* effect in the law relating to remedies. Named after the classic 1950 Japanese film *Rashomon* by the acclaimed director Akira Kurosawa,[4] the *Rashomon* effect is understood to represent contradictory interpretations of the same event by different people. On some accounts, the basis of an award of damages on the basis of the user principle has a practical significance.[5] However, on a different view, it is a matter of no practical consequence.[6] If the underlying basis of the award carries with it no practical import, then the entire exercise of trying to resolve this apparently intractable debate may perhaps be better laughed off as much ado about nothing. This article suggests that the better view is that, where such awards are available, whilst practical differences follow depending on which basis, compensatory or restitutionary, is preferred, both approaches are equally plausible. Despite their comparable credibility, the advantages of a compensatory analysis will invariably be preferred by plaintiffs who are normally permitted to bring such claims as they please. Thus, as a matter of litigation strategy, the theoretical differences fade into insignificance as lawyers would be well advised to argue both but lead with compensation. Nevertheless, a proper understanding of their underlying basis is, despite its apparent practical insignificance in its particular context, of immense value to the law of remedies more generally.

II. A brief history of the user principle

2 Damages awarded under the user principle come in numerous guises. The best established of such awards concern awards of

3 *Stoke-on-Trent Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1416.

4 The film explores the death of a samurai near Kyoto's Rashomon Gate and is famous for its then novel plot device. The film tells the story of the samurai's death through the perspective of four different characters (the samurai's wife, a bandit, a woodcutter and the dead samurai speaking through a medium) who give wildly different accounts of the same event.

5 See, *eg*, *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 regarding the availability of the defence of change of position.

6 See, *eg*, *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [41], *per* Andrew Phang Boon Leong JA, describing the difficulties as "principally *juridical*" [emphasis in original].

"wayleave" arising out of trespass to land.[7] In *Whitwham v Westminster Brymbo Coal and Coke Co*[8] ("*Whitwham*"), Lindley LJ remarked that the wayleave cases are "based upon the principle that, if one person has without the leave of another been using that other's land for his own purposes, he ought to pay for such user".[9] In that case, the defendant had caused damage to the plaintiff's land by tipping refuse from their colliery upon it. They sought to limit their liability to the diminution in value of the plaintiff's land rather than the larger wayleave award. In rejecting the appeal, Lindley LJ remarked:[10]

> [O]n what principle of justice can it be said that these defendants are to use the plaintiffs' land for years for their own purposes, and to pay nothing for it, in addition to the injury that they have done to the land?

Where the use of land is more extensive and amounts to an occupation rather than a mere temporary user, the same principle is reflected by an award but goes by a different name. Such awards, sometimes referred to as mesne profits, were available regardless of whether the land could or would have been let to another during the period of occupation.[11] The same principle applies in respect of chattels.

3 In *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*[12] ("*Strand Electric*"), after referring to awards of wayleave, Denning LJ remarked: "I see no reason why the same principle should not apply to detention of goods."[13] Somervell LJ in the same case drew the analogy with claims for mesne profits rather than wayleave but reached the same conclusion as to the availability of awards assessed in accordance with what has come to be known as the user principle.[14]

4 In *Stoke-on-Trent Council*, Nicholls LJ observed that the same principle has also been applied in relation to intangible property, in

7 *Martin v Porter* (1839) 5 M & W 351; (1839) 151 ER 149; *Powell v Aiken* (1858) 4 K & J 343; (1858) 70 ER 144; *Hilton v Woods* (1867) LR 4 Eq 432; *Jegon v Vivian* (1871) LR 6 Ch App 742; *Phillips v Homfray* (1883) 24 Ch D 439; *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35; [2011] 1 AC 380.

8 [1896] 2 Ch 538.

9 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 541–542.

10 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 542.

11 *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 at 288; *Dean and Chapter of the Cathedral of Christ Cantebury v Whitbread plc* [1995] 1 EGLR 82 at 85.

12 [1952] 2 QB 246.

13 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254.

14 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252.

particular patents.[15] As rationalised by Lord Shaw in *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*[16] ("*Watson*"):[17]

> [T]here remains that class of business which the respondents would not have done; and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorised sale or use of every one of the infringing machines in a market which the [patentee], if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters Ld v Metropolitan Gas Meters Ld* (28 RPC 163). Each of the infringements was an actionable wrong, and although it may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorised use of his property. Otherwise, the remedy might fall unjustly short of the wrong.

5 While more established in respect of patent infringements, in *Blayney t/a Aardvark Jewelry v Clogau St David's Gold Mines Ltd*,[18] Sir Andrew Morritt V-C extended the same principle to instances of copyright infringement thus:[19]

> Given that that is the rule in the case of infringements of patents I can see no reason not to apply it in cases of infringements of copyright. In each case the infringement is an interference with the property rights of the owner … Though the nature of the monopoly conferred by a patent is not the same as that conferred by copyright I see no reason why that should affect the recoverability of damages in cases where the monopoly right has been infringed. The fact that the plaintiff may not be able to prove the application of one measure of damages, namely lost sales, does not mean that he has suffered no damage at all, rather some other measure by which to assess the compensation for that interference must be sought. Whilst, no doubt, there are differences between the rights granted to a patentee and those enjoyed by the owner of the copyright they draw no distinction between the effect of an infringement of a patent rather than a copyright.

15 *Stoke-on-Trent Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1416–1418.

16 (1914) 31 RPC 104.

17 *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104 at 120.

18 [2002] EWCA Civ 1007; [2003] FSR 360.

19 *Blayney t/a Aardvark Jewelry v Clogau St David's Gold Mines Ltd* [2002] EWCA Civ 1007; [2003] FSR 360 at [20].

It has also been applied in the context of trade mark infringement in *32Red plc v WHG (International) Ltd*,[20] but here its applicability is far from uncontroversial. In *32Red plc v WHG (International) Ltd*, the parties agreed that the user principle was the correct basis for assessment. However, in *Reed Executive v Reed Business Information*,[21] Jacob LJ was "by no means convinced that the 'user' principle *automatically* applies in trade marks and passing off cases, especially where the mark concerned is not the sort of 'mark' available for hire" [emphasis in original].[22]

III. Related awards: *Wrotham Park* damages

6 Damages awarded under the Chancery Amendment Act 1858[23] ("Lord Cairns' Act"),[24] in lieu of specific performance or an injunction, are also regarded as being premised "[o]n an analogous principle".[25] This can be clearly seen in the landmark case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[26] ("*Wrotham Park*"). In that case, the first defendant developed its land in breach of a restrictive covenant. The plaintiffs brought an action shortly after the building works began but failed to seek an interlocutory injunction to restrain the development so that the works were complete by the date of the trial. Brightman J declined to grant the plaintiffs' prayer for a mandatory injunction for the demolition of the buildings as he considered that it would "be an unpardonable waste of much needed houses to direct that they now be pulled down".[27] Nevertheless, his Lordship was leery of awarding the plaintiffs merely nominal damages simply because the value of its own land had not been diminished by one farthing as a consequence of the breach:[28]

> If, for social and economic reasons, the court does not see fit in the exercise of its discretion, to order demolition of the 14 houses, is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question.

20 [2013] EWHC 815.
21 [2004] RPC 40.
22 *Reed Executive v Reed Business Information* [2004] RPC 40 at [165].
23 c 27.
24 Chancery Amendment Act 1858 (c 27) s 2.
25 *Stoke-on-Trent Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1413, *per* Nourse LJ.
26 [1974] 1 WLR 798.
27 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 811.
28 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 812.

In buttressing his instinct as a matter of common sense, his Lordship drew support[29] from cases awarding wayleave rent,[30] patent infringement[31] and detinue[32] in accordance with the user principle mentioned above. His Lordship eventually concluded that:[33]

> … a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from [the first defendants] as a *quid pro quo* for relaxing the covenant.

Subsequent cases have established that the measure of damages so assessed is not to be regarded as peculiar and different from an assessment of the same at common law.[34] In the words of Chadwick LJ in *World Wide Fund for Nature v World Wrestling Federation Inc*,[35] "[t]he power to award damages on a *Wrotham Park* basis does not depend on Lord Cairns's Act: it exists at common law".[36]

IV. Remedial objectives of the user principle: There and back again?

7 The early cases awarding substantial damages on the basis of the user principle (or analogous principles) do not appear to have analysed the question of its remedial objective with too much sophistication, resorting instead to appeals to justice to vindicate them. In some instances, the awards are made without identifying them as either compensatory or restitutionary at all, the court simply content that they were available. Thus, in *Swordheath Properties Ltd v Tabet*,[37] Megaw LJ, after referring to authorities supporting such awards, simply concluded:[38]

> It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the

29 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 812–814.
30 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538.
31 *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104.
32 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246.
33 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 815.
34 *Johnson v Agnew* [1980] AC 367; *Jaggard v Sawyer* [1995] 1 WLR 269; *Attorney General v Blake* [2001] 1 AC 268. *Cf Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361.
35 [2007] EWCA Civ 286; [2008] 1 WLR 445.
36 *World Wide Fund for Nature v World Wrestling Federation Inc* [2007] EWCA Civ 286; [2008] 1 WLR 445 at [54].
37 [1979] 1 WLR 285.
38 *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 at 288.

> value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages.

His Lordship does not elaborate upon whether the principle he referred to was compensatory or restitutionary. This is especially perplexing as the two authorities cited in support appeal to different objectives. *Whitwham*, it will be seen, appears to favour a compensatory view of the user principle whereas *Penarth Dock Engineering Co Ltd v Pounds*[39] ("*Penarth*") is generally regarded as one of the early authorities supporting a restitutionary perspective.

8 Where the awards are referred to as compensatory, there is no attempt to explain, beyond broad appeals to justice, how such an understanding of them can be squared with the obvious absence of pecuniary loss on the part of the plaintiffs. Typical of the reasoning to be found in the early cases is the following pithy exercise by Lindley LJ in *Whitwham*:[40]

> It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user.

Later in the same judgment, he asks, rhetorically: "[O]n what principle of justice can it be said that these defendants are to use the plaintiffs' land for years for their own purposes, and to pay nothing for it, in addition to the injury that they have done to the land?"[41] Lindley LJ uses the word "compensation" thrice in his judgment.[42] Lopes LJ refers to the plaintiffs being "compensated" in addition using the word "loss" twice to describe the effect of the defendants' trespass on the plaintiffs.[43] Rigby LJ refers to the principle as a means of "compensating" plaintiffs.[44] Yet the sum actually awarded far exceeded the diminution in value to the plaintiffs' land attributable to the defendants' trespass. Furthermore, in referring to the controversial authority of *Phillips v Homfray*,[45] Lindley LJ observed that, in applying the principle, "[i]t must be borne

39 [1963] 1 Lloyd's Rep 359.
40 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 541–542.
41 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 542.
42 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 541–542.
43 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 543.
44 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 543.
45 (1871) LR 6 Ch 770.

in mind that if one man runs trucks on rails over another man's land it does not do any harm whatever, and there is no pecuniary damage".[46]

9 Mention should also be given to two famous and oft-cited hypothetical scenarios intended to provoke sympathy in readers for such awards. The first is the well-known scenario involving a chair posed by the Earl of Halsbury LC in *The Mediana*:[47]

> Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd[.]

The second is the equally celebrated example involving a horse devised by Lord Shaw in *Watson*:[48]

> If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'

10 The traditional justification for the compensatory perspective of awards made under the user principle is that, although successful plaintiffs have not suffered any actual pecuniary loss, they have in fact lost an opportunity to bargain with the defendant.[49] Thus, it is suggested that they may legitimately be regarded as compensatory. In the words of Megarry V-C in *Tito v Waddell (No 2)*:[50]

> [T]he plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost.

11 However, this view of awards made under the user principle has been dismissed by a number of scholars as fictional.[51] First, awards

46 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 at 542.

47 [1900] AC 113 at 117.

48 *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104 at 119.

49 Robert J Sharpe & Stephen M Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OxJLS 290. See also *Tito v Waddell (No 2)* [1977] Ch 106 at 335; *Jaggard v Sawyer* [1995] 1 WLR 269; and *Gafford v Graham* (1998) 76 P & CR 18.

50 [1977] Ch 106 at 335.

51 Peter Birks, "Profits of Breach of Contract" (1993) 109 LQR 518; William Goodhart, "Restitutionary Damages for Breach of Contract: The Remedy that Dare Not Speak Its Name" [2001] RLR 104; James Edelman, "The Compensation Strait-

(*cont'd on the next page*)

made on this basis are assessed on the basis of an assumption that the plaintiff is reasonably willing to negotiate. Addressing the related principle of *Wrotham Park* damages, Millett LJ in *Jaggard v Sawyer*[52] remarked that:[53]

> In situations of this kind a plaintiff should not be treated as eager to sell, which he very probably is not. But the court will not value the right at the ransom price which a very reluctant plaintiff might put on it.

Sometimes, as was the case in *Wrotham Park* itself,[54] this assumption will be demonstrably false. In that case, Brightman J found that the plaintiffs would not have been willing to negotiate at all. In such circumstances, the award would undervalue the plaintiffs' loss. Secondly, and conversely, an award under the user principle may also end up overcompensating some plaintiffs. In the unusual case of *Inverugie Investments Ltd v Hackett*[55] ("*Inverugie Investments*"), the plaintiff sought mesne profits from the defendants for their wrongful occupation and use of 30 apartments within a larger hotel complex over a period of 15 years. The defendants, the hotel operators, unfortunately operated the hotel at a loss. Despite the fact that occupancy rates for the hotel were so low that the plaintiff had seemingly lost no opportunity to lease the apartments occupied by the defendants, the plaintiff's award was not reduced to reflect the low occupancy rates over that period.

12 As the law of restitution for unjust enrichment slowly came to be judicially recognised by the courts,[56] this lack of perfect compatibility between remedy and objective led to increasing calls for a reconsideration of the underlying objectives of the user principle as restitutionary rather than compensatory. One of the early proponents of a reimagination of damages under the user principle as restitutionary rather than compensatory was Lord Denning. In *Strand Electric*, the defendant retained the plaintiff's switchboards in order to facilitate the sale of a theatre. In awarding the plaintiff the full market hire rate for the switchboards in an action for detinue, Denning LJ remarked:[57]

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jacket and the Lost Opportunity to Bargain Fiction" [2001] RLR 104; James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) at pp 99–102; Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at pp 439–440; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 635–638.

52 [1995] 1 WLR 269.

53 *Jaggard v Sawyer* [1995] 1 WLR 269 at 282–283.

54 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 815.

55 [1995] 1 WLR 713.

56 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. See also Peter Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473.

57 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254–255.

> The claim for a hiring charge is therefore not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort.

13 Subsequently, in *Penarth*, the plaintiffs sued the defendant in trespass for ignoring numerous demands to remove his floating pontoon from the plaintiffs' dock. Lord Denning MR awarded substantial damages despite acknowledging that the plaintiffs had not suffered any loss. According to his Lordship, "the measure of damages is not what the plaintiffs have lost but what benefit the defendant obtained by having the use of the berth".[58] One of the leading cases supporting a restitutionary analysis is *Ministry of Defence v Ashman*[59] ("*Ashman*"). The Ashmans had been living in a house leased from the Ministry of Defence. They received a substantial discount owing to Mr Ashman's position as a flight sergeant in the Royal Air Force. However, one of the conditions of the lease was that the lease would be forfeited if they separated and ceased to live together. After they separated, Mrs Ashman received a notice to vacate the house. When she failed to do so, the Ministry of Defence sought damages in the form of mesne profits against her for the period after the expiry of the lease. The dispute concerned the appropriate rate at which the mesne profits should be calculated. Allowing the appeal from the trial judge's award at the full market rate for the property, the Court of Appeal reduced the award to the cost of local authority housing instead. According to Hoffmann LJ, "it has not been expressly stated that a claim for mesne profit for trespass can be a claim in restitution. Nowadays I do not see why we should not call a spade a spade".[60] The reduction in the award was justified on the basis of the application of subjective devaluation. In Singapore, the High Court in *Cavenagh Investment Pte Ltd v Kaushik Rajiv*[61] ("*Cavenagh Investment*") likewise recently classified an award for mesne profits as restitutionary. According to the court, there is no reason:[62]

> … why we ought not to recognise that where a distinction can be made between a compensation-based claim and a restitution-based claim, a claim for *mesne* profit, market rent, under the 'user principle', or however one may choose to call the claim, is a claim for a restitutionary remedy.

58 *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 at 362.
59 [1993] 2 EGLR 102.
60 *Ministry of Defence v Ashman* [1993] 2 EGLR 102 at 106.
61 [2013] 2 SLR 543.
62 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [50].

14 In *Attorney General v Blake*,[63] Lord Nicholls, in describing the awards made in cases applying the user principle, stated that:[64]

> [T]hese awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule [that damages are compensatory].

Whilst his Lordship did not indicate explicitly that he considered such awards restitutionary, he subsequently clarified himself in *Kuwait Airways Corp v Iraqi Airways Co*:[65]

> I have just noted that the fundamental object of an award of damages for conversion is to award just compensation for loss suffered. Sometimes, when the goods or their equivalent are returned, the owner suffers no financial loss. But the wrongdoer may well have benefited from his temporary use of the owner's goods. It would not be right that he should be able to keep this benefit. The court may order him to pay damages assessed by reference to the value of the benefit he derived from his wrongdoing. I considered this principle in *Attorney General v Blake*. … In an appropriate case the court may award damages on this 'user principle' in addition to compensation for loss suffered. For instance, if the goods are returned damaged, the court may award damages assessed by reference to the benefit obtained by the wrongdoer as well as the cost of repair.

15 Similar developments can also be detected in the related award of *Wrotham Park* damages. While Brightman J employed the language of compensation in *Wrotham Park* itself, in *Surrey County Council v Bredero Homes Ltd*[66] ("*Surrey County*"), Steyn LJ explains that:[67]

> … [t]here is … a third principle which protects the aggrieved party's restitutionary interest. The object of such an award is not to compensate the plaintiff for a loss, but to deprive the defendant of the benefit he gained by the breach of contract.

His Lordship then suggests that *Wrotham Park* "is only defensible on the basis of the third or restitutionary principle".[68] Perhaps even more

63 [2001] 1 AC 268.
64 *Attorney General v Blake* [2001] 1 AC 268 at 279.
65 [2002] 2 AC 883 at [87].
66 [1993] 1 WLR 1361.
67 *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 at 1369.
68 *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 at 1369.

forcefully, Lord Nicholls in *Attorney General v Blake* describes *Wrotham Park* thus:[69]

> The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.

16 However, the march towards a restitutionary justification of awards under the user principle is not altogether relentless. Pockets of resistance to the restitutionary analysis remain. Denning LJ was clearly in the minority in *Strand Electric*. Shortly after *Surrey County* was decided, the English Court of Appeal decided the case of *Jaggard v Sawyer*. Sir Thomas Bingham MR, giving the leading judgment, stated bluntly: "I cannot, however, accept that Brightman J's assessment of damages in *Wrotham Park* was based on other than compensatory principles."[70] Likewise Millett LJ, who delivered a separate judgment, remarked that "[i]t is plain from his judgment in the *Wrotham Park* case that Brightman J's approach was compensatory, not restitutionary".[71] More recently, in *World Wide Fund*, a forceful Chadwick LJ asserted that such awards (and rather more controversially, awards for an account of profit) were compensatory in nature:[72]

> When the court makes an award of damages on the *Wrotham Park* basis it does so because it is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. Lord Nicholls's analysis in *Blake*'s case demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong. The circumstances in which an award of damages on the *Wrotham Park* basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss. To label an award of damages on the *Wrotham Park* basis as a 'compensatory' remedy and an order for an account of profits as a 'gains-based' remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a

69 *Attorney General v Blake* [2001] 1 AC 268 at 283–284.
70 *Jaggard v Sawyer* [1995] 1 WLR 269 at 281.
71 *Jaggard v Sawyer* [1995] 1 WLR 269 at 291.
72 *World Wide Fund for Nature v World Wrestling Federation Inc* [2007] EWCA Civ 286; [2008] 1 WLR 445 at [59].

> flexible response to the need to compensate the claimant for the wrong which has been done to him.

17 Criticism of the restitutionary analysis can likewise be seen in the academic literature. Stevens criticises the restitutionary analysis as equally flawed compared to the compensatory analysis: "Just as an expanded notion of loss has sometimes been used to explain [such awards], an expansion notion of gain has been suggested."[73] Thus he observed that while the majority's reasoning in *Strand Electric* has rightly been criticised as fictional, Denning LJ's restitutionary analysis is equally faulty:[74]

> The defendant did not profit from the detention [of the plaintiff's equipment], as it had no use for the equipment. … the overall result of the defendant's tort was not to leave it factually better off. If the wrong had not been committed, no substitute equipment would have been hired. As with losses, if the claim is genuinely based upon the defendant's gain, his overall position as a result of the wrong ought to be taken into account. Without any factual gain made, the restitutionary analysis is equally artificial.

18 Stevens acknowledges that "it may be objected that a broader notion of 'gain' is required and that the gain is not factual but normative".[75] However, if a restitutionary analysis resorts to a normative notion of gain, how is it superior to the compensatory analysis? As McInnes observed, "[i]f it is fictional to regard an objectively reasonable price as the claimant's loss, it must equally be fictional to treat it as the defendant's gain. Loss and gain reflect two sides of the same hypothetical bargain".[76]

19 The key to resolving the dispute lies therefore in determining the proper scope of loss and gain in the law. As Mance LJ explained in *Experience Hendrix LLC v PPX Enterprises Inc*:[77]

> Whether the adoption of a standard measure of damages represents a departure from a compensatory approach depends upon what one understands by compensation and whether the term is only apt in circumstances where an injured party's financial position, viewed subjectively, is being precisely restored. The law frequently introduces objective measures (*eg* the available market rules in sale of goods) or limitations (*eg* remoteness). The former may increase or limit a claimant's ability to recover loss actually suffered. Another situation where damages do not necessarily depend upon precisely what would

73 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at p 79.
74 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at p 79.
75 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at p 79.
76 Mitchell McInnes, "Gain, Loss and the User Principle" [2006] RLR 76 at 83.
77 [2003] EWCA Civ 323; [2003] 1 All ER (Comm) 830 at [26], *per* Mance LJ.

have occurred but for the wrong is where there has been a conversion: *cf Kuwait Airways Corpn v Iraqi Airways Co*.

V. The importance of being restitutionary?

20 It can be seen that whether we are satisfied with either the compensatory or restitutionary analyses or neither depends very much upon our notions of compensation and restitution as well as the related concepts of loss and gain. A focus on purely pecuniary loss deprives the compensatory analysis of much of its explanatory force in certain scenarios. The same is true of the restitutionary analysis if gain is measured purely in pecuniary terms. Depending therefore on one's perspective of loss or gain and depending on the particular facts, one or the other analysis may appear to be a better fit, both analyses may be equally satisfactory or both analyses may prove equally flawed. This *Rashomon* effect seems inevitable partly because of "the pervasiveness of ambiguity in natural languages"[78] and partly because the cases demonstrate a myriad range of different fact patterns. In some cases, it may be that the defendant's use of the plaintiff's property was not profitable and it is found as a fact that the plaintiff would likely have profitably made use of it himself but for the defendant's interference. In such a case, adopting a narrow purely pecuniary view of gain and loss would favour a compensatory analysis. Conversely, the defendant's use of the plaintiff's property may have been extremely lucrative in circumstances when the plaintiff is found to have been unlikely to have made use of the property himself. Here, again assuming a strict pecuniary view of gain and loss, a restitutionary analysis would prove more persuasive.

21 If a broader view of gain and loss is adopted, then most cases engaging the user principle could be equally justified by either analysis. Thus, we also see cases justifying such awards on a mixed or even alternative basis. An example of the former is *Inverugie Investments*, in which Lord Lloyd suggests that "[t]he principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both".[79] A variant of the mixed rationale explanation is the suggestion by the Singapore Court of Appeal in *ACES System Development Pte Ltd v Yenty Lily*[80] that "there are, in point of fact,

78 Thomas Wasow, Amy Perfors & David Beaver, "The Puzzle of Ambiguity" in *Morphology and the Web of Grammar: Essays in Memory of Steven G Lapointe* (C Orhan Orgun & Peter Sells eds) (University of Chicago Press, 2005) at p 265.

79 *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 718. See also *Yenty Lily v ACES System Development Pte Ltd* [2013] 1 SLR 577 at [67]–[68], *per* Judith Prakash J.

80 [2013] 4 SLR 1317.

two distinct *principles* (*viz*, the compensation principle and the user principle) – as opposed to two different *rationales* with respect to the *same principle* (here, the user principle)" [emphasis in original].[81] This view, it is said, "allows (and attractively so) the user principle to be regarded as a *wholly separate principle or approach* premised on a *restitutionary* basis" [emphasis in original].[82] On this view, some cases previously regarded as being premised upon the user principle would presumably have to be recharacterised as orthodox cases of compensation not engaging the user principle. Others, properly regarded as involving the user principle, would be regarded as being justified on a purely restitutionary basis. Yet others, such as *Strand Electric*, can be analysed either way. Thus, according to Andrew Phang Boon Leong JA, it might be preferable:[83]

> … to acknowledge that Somervell LJ and Romer LJ were in fact referring to the compensation principle when arriving at their respective decisions. If so, then only Denning LJ was utilising the user principle in arriving at his decision.

One of the key problems with such an alternative analysis is that it appears to adopt a broader conception of loss[84] than that employed by critics of the compensatory analysis of the user principle, who employ a narrow pecuniary view of loss. If such a broader conception of loss is permissible, it is difficult to contemplate a case in which it is either necessary or preferable to rely on a restitutionary analysis. This is because, to the extent that differences exist in terms of calculation of an award under the user principle depending on one's analysis, no advantage seems to accrue to a plaintiff employing a restitutionary analysis.[85]

A. Theoretical differences: Practical significance or much ado about nothing?

22 What then are the consequences of adopting either analysis (or the view that both analyses are available)? Will there be substantial differences in the calculation of the award or is it a case of much ado

81 *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [38], *per* Andrew Phang Boon Leong JA.

82 *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [41], *per* Andrew Phang Boon Leong JA.

83 *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 at [39], *per* Andrew Phang Boon Leong JA.

84 It is important to note that in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, Somervell LJ considered that substantial damages were available even if the plaintiffs "had suffered no loss" (at 250) and Romer LJ ruled out contrary proof of loss altogether (at 256–257).

85 See paras 22–25 below.

about nothing? The authorities as they stand suggest that there may be at least two important differences that flow from a restitutionary rather than a compensatory analysis. The first is the availability to the defendant of what has been called subjective devaluation.[86] In cases of unjust enrichment, a defendant is able to subjectively devalue a benefit conferred upon him. The necessity of such a principle in cases of unjust enrichment was neatly encapsulated by Pollock CB in *Taylor v Laird*[87] when he observed: "One cleans another's shoes. What can the other do but put them on?"[88] Its availability in cases of restitution for wrongs (torts) rather than unjust enrichment, however, is rather less obvious. In *Ashman*, the award of mesne profits against the defendant was not assessed at the market value of the property that was the subject of the trespassory occupation as it ordinarily would be, even on a restitutionary analysis of the user principle. Instead it was measured by the cost of local authority housing that the defendant would have gone into had any been available. A similar result was reached in *Ministry of Defence v Thompson*[89] ("*Thompson*") which featured similar facts. It is generally accepted that the principle of subjective devaluation is generally irrelevant where restitution is sought as a remedy for a tort claim.[90] This is because, unlike defendants in claims for unjust enrichment, tortfeasors' actions are not involuntary, even in cases involving strict liability torts such as trespass. Both *Ashman* and *Thompson* have been justified on the basis of their exceptional facts.[91] In both cases, the trespass involved a tenant who was previously lawfully in occupation wrongfully staying on after the lease had terminated. In both instances, the originally lawful occupation was heavily subsidised and neither defendant would have remained in occupation had alternative affordable accommodation been available. While commentators have accommodated the two cases on the basis of their exceptional facts owing to the defendants' lack of practical ability to leave the premises, it is arguable that they are in fact simply wrongly decided. As Virgo astutely observes, in relation to *Ashman*, "[l]ogically, if the defendant had been looking for free accommodation with a friend she could not be

86 Note the divergence in approaches, in the context of a claim in unjust enrichment, between Lord Clarke and the majority and Lord Reed in *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938.

87 (1956) 25 LJ Ex 329.

88 *Taylor v Laird* (1956) 25 LJ Ex 329 at 332.

89 [1993] 2 EGLR 107.

90 James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) at p 71; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 626–627.

91 James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) at p 71; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 626–627.

considered to have received any valuable benefit at all".[92] Such a conclusion is instinctively unappealing. Virgo defends the cases on the basis that:[93]

> … [s]uch recognition of restitutionary damages will not cause any injustice to the claimant, because, if his or her loss is greater than the defendant's actual benefit, the claimant can simply elect to claim compensatory rather than restitutionary damages.

It will be seen that whether or not an alternative claim for compensatory damages will prove to be a panacea will depend in large part of one's definition of gain and loss.[94]

23 The second important difference is the possible availability of the defence of change of position where the plaintiff seeks a restitutionary award. Here again the availability of the defence is controversial. In *Cavenagh Investment*, yet another case involving a claim for mesne profits, the Singapore High Court held that the defence was available because the award was restitutionary. The plaintiff, Cavenagh Investment Pte Ltd, was part of a group of companies (the Lee Tat group) structured to hold property, all of which were either solely or majority owned by Ching Mun Fong. The plaintiff's only assets were two units at the Pebble Bay condominium development and the suit concerned one of these units. The properties of the Lee Tat group were managed by Lee Tat Property Management Pte Ltd, a company run by Ching and several employees, including one Mohamed Razali bin Chichik. The defendant, Rajiv Kaushik, responded to an advertisement seeking prospective tenants for the disputed property and eventually entered into what he believed was a tenancy agreement with the plaintiff through Razali. This arrangement lasted from December 2008 through March 2011, during which monthly rent of S$9,000 and two months' security deposit was paid by the defendant's employer, I2MS.Net Pte Ltd ("I2MS.Net"), to Razali. The lease, it transpired, was unauthorised and Razali had not handed over the sums paid by I2MS.Net to the plaintiff. The fraud was discovered in March 2011 and the plaintiff sued the defendant claiming mesne profits for trespass to land. Chan Seng Onn J considered that "a claim for mesne profit, market rent, under the 'user principle', or however one might choose to call the claim, is a claim for a restitutionary remedy".[95] His Honour further found both that the plaintiff was insistent on a minimum monthly rent of $10,000 for the

92 Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at p 467. *Cf Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938 at [132]–[135], *per* Lord Reed JSC in the minority.

93 Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at p 467.

94 See para 28 below.

95 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [50].

property and that no tenants were willing to pay such a rent throughout the period of the defendant's wrongful occupation. As such, the plaintiff suffered no financial loss. The court had occasion to consider the view expressed by Lord Goff in *Lipkin Gorman v Karpnale Ltd*[96] that "it is commonly accepted that the defence [of change of position] should not be open to a wrongdoer".[97] While some commentators have construed this short statement as excluding the operation of the defence in cases of restitution for wrongs,[98] others suggest that the defence ought to be available *prima facie* to tortfeasors subject to any overriding policy considerations.[99] The court preferred the latter view and accordingly reduced the defendant's liability by the amount of rent actually paid. The difficulty with the case is that the academic commentary cited by the court in support of its view may not actually support the final result. The court attached significant credence to the views of Bant, which it described as "more nuanced".[100] However, Bant suggests that "[e]ach wrong must be individually addressed to see whether recognition of a change of position defence would undermine the law's prohibition".[101] She further posits that:[102]

> … allowing the change of position defence in cases where the claimant's action is based on their vested proprietary right to the benefit (such as claims of conversion, or claims to vindicate a pre-existing property right) may be regarded as undermining the law's traditional protection of proprietary rights.

Although both passages are cited with apparent approval, Chan J concludes: "I do not see why the defence should not apply to a restitutionary claim for trespass to land."[103] But surely an action for trespass to land is a claim to vindicate a pre-existing property right? This is not to suggest that the result cannot be justified. Others, most notably Lord Nicholls, have suggested that the change of position defence should be available to an innocent converter, a tortfeasor in an analogous position to a trespasser having likewise interfered with a pre-existing property right.[104]

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96 [1991] 2 AC 548.

97 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580.

98 See, *eg*, Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 699.

99 See, *eg*, Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 171.

100 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [63].

101 Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 172.

102 Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 210.

103 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [65].

104 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883 at [79]. See also Richard Nolan, "Change of Position" in *Laundering and Tracing* (Peter Birks ed) (Clarendon Press, 1995) at p 154.

24 While there is some discussion in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*[105] ("*Devenish*") of what was there described as a "passing-on defence"[106] in the context of determining if compensatory damages were inadequate so that a restitutionary award would be available,[107] there was no serious consideration of whether such a defence was actually applicable to a claim for either a compensatory or a restitutionary award. Indeed, the description of the phenomenon as a defence in the context of a compensatory award has been criticised. As Odudu and Virgo observed:[108]

> … it is odd to use the language of a defence when the Court was only concerned with the identification and assessment of an appropriate remedy rather than with the negation or qualification of the underlying cause of action.

While this criticism may possibly be dismissed as semantic nitpicking, Odudu and Virgo rightly note that "whether the fact of passing-on really can negate loss suffered is a matter of some difficulty, which was ignored by the Court".[109] The case concerned a breach by the defendant of European competition law through collusion with other vitamin suppliers to increase their prices. While the plaintiff had passed on its loss to its own purchasers, it is arguable that "the effect of the cartel agreements was to squeeze its margin so that it did suffer a loss, despite the fact that the increase in prices had been passed on to customers".[110] The controversy is eerily familiar to the difficulties arising out of the market rule of damages assessment in the context of sales of goods where defective goods have been sold pursuant to a sub-sale. The leading authorities[111] are in disarray, probably irreconcilable and likely reflect a fundamental disagreement as to whether loss should be regarded narrowly in purely pecuniary terms or broadly on a normative basis. Given the diffidence of the discussion, its rather oblique context, and the possibility that passing-on could apply equally to a claim for a restitutionary award, it is not obvious that *Devenish* introduced a third practical significance to a proper understanding of the user principle as either restitutionary or compensatory.

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105 [2008] EWCA Civ 1086; [2009] 3 WLR 198.

106 *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086; [2009] 3 WLR 198 at [108], *per* Arden LJ.

107 A requirement thought to be introduced by Lord Nicholls in *Attorney-General v Blake* [2001] 1 AC 268 at 285.

108 Okeoghene Odudu & Graham Virgo, "Inadequacy of Compensatory Damages" [2009] RLR 112 at 113.

109 Okeoghene Odudu & Graham Virgo, "Inadequacy of Compensatory Damages" [2009] RLR 112 at 113–114.

110 Okeoghene Odudu & Graham Virgo, "Inadequacy of Compensatory Damages" [2009] RLR 112 at 114.

111 See, *eg*, *Slater v Hoyle & Smith* [1920] 2 KB 11 and *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87.

25 It is not generally thought that any difference will follow in terms of limitation depending on whether the award is regarded as compensatory or restitutionary.[112]

B. Gains and losses through the looking glass

26 It is not sufficient, however, to consider the availability of principles and defences in the abstract to determine if practical consequences flow from a characterisation of awards made under the user principle as compensatory or restitutionary. The availability or otherwise of these principles and defences interact with the law's notions of gain and loss to different effect. If we consider that both gain and loss can be interpreted either broadly to include normative gains and losses or narrowly to be limited to pecuniary gains and losses, it follows that there are four theoretically possible permutations that the law can adopt. First, both gains and losses can be interpreted broadly. Secondly, both gains and losses can be interpreted narrowly. Thirdly, gains can be interpreted broadly while losses are interpreted narrowly. Finally, and conversely, gains can be interpreted narrowly while losses are interpreted broadly. Whilst theoretically possible simply as a matter of mathematical permutation, the third and fourth possibilities would be difficult to justify given the inconsistent views of gain and loss that they entail. Accordingly, only the first and second views will be considered.

27 On the first view, both gains and losses can include normative gains and losses. The absence of either actual pecuniary loss to the plaintiff or actual financial gain to the defendant thus becomes irrelevant to the success of a claim for an award under the user principle. So assessed, however, the normative gain on the part of the defendant simply reflects the normative loss on the part of the plaintiff so that, at least *prima facie*, there ought to be no difference in quantum whichever view is taken. On this view, since all interferences will entail a normative loss and quantification will not lead to a larger award on the restitutionary basis, it is difficult to see the practical utility of making a restitutionary award available to plaintiffs. This is especially true if the restitutionary award (but not the compensatory award) is capable of being subjectively devalued and/or met with the defence of change of position.

28 If the second view is to be preferred, then the practical significance of a proper theoretical understanding of the user principle takes on greater import. Depending on the particular facts of any given

112 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 703–704. *Cf Chesworth v Farrar* [1967] 1 QB 407.

case, the defendant's gain may be greater or lesser than the plaintiff's loss. This difference may be exacerbated by the availability of the principle of subjective devaluation and/or the change of position defence. However, on this view, the courts must be prepared to entertain the possibility of a nil award in some cases. This seems to be an inevitable conclusion and, but for the five days of occupation for which the defendant did not pay rent to the plaintiff's rogue agent in *Cavenagh Investment*, this would have been the precise result in that case. Clearly, Chan J did not consider this to be an issue. However, if we alter the facts of the case slightly so that the reason for the reduction in the restitutionary award was not the result of the operation of the change of position defence but that of the principle of subjective devaluation, it is difficult to imagine a court being comfortable with the same result.[113] Suppose the defendant simply stays on following the expiry of a valid lease because he has fallen on hard times and is unable to afford alternative accommodation. Perhaps, as Virgo suggests, he sought free accommodation with friends and family but they all spurned him. Instead of being a greedy rogue seeking to enrich himself, let us imagine that the plaintiff's errant employee had simply sympathised with the defendant and decided that, since the apartment would be empty anyway, there was no harm in permitting the defendant to continue in his occupation. It is difficult to imagine that a court would in such circumstances still limit the plaintiff's award to one of nominal damages. Yet, as Burrows observes, in the context of an analysis of *Wrotham Park* damages, "[j]ust as compensation runs out where the claimant has suffered no loss, so restitution runs out whether the wrongdoer has made no gain".[114] He cautions against "the instinct that, even if compensation and restitution are inappropriate, one still has a need for an appropriate remedy to mark the wrongdoing", conceding that "at that point … one should accept that nominal damages alone are justified".[115] Judicial instinct is, however, a difficult beast to tame. This does not mean that such a view of gain and loss is untenable. It may well simply be the case that, if the courts adopt a narrow purely pecuniary view of gains and loss, they ought to exclude the operation of the principle of subjective devaluation altogether.

113 In this context, the divergence in approaches in *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938 will prove significant: the majority analysis applied in the context of a tort will produce the discomfort described in the main text whereas the defence will not be available on Lord Reed's analysis.

114 Andrew Burrows, "Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 180.

115 Andrew Burrows, "Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at pp 180–181.

VI. An even bigger picture

29 Thus far, while it has been demonstrated that a restitutionary analysis of the user principle could yield differences in result from a compensatory analysis, much less has been said of which analysis is preferable as a matter of principle. If we confine our analysis to the context of the user principle, it is not immediately obvious that one view is preferable to the other. Much depends on whether the law's conception of gain and loss ought to be confined to pecuniary gains and losses and cases engaging the user principle do not demonstrate in an obvious manner which view is preferable. However, stepping away from cases involving the user principle allows us to witness similar awards in other areas of the law that have either never been analysed in terms of restitution or are incapable of being so analysed, thereby supporting the compensatory analysis and demonstrating that the law takes a broad rather than narrow view of loss. In contract, quite apart from *Wrotham Park* damages, the market rule of assessment of damages is generally considered compensatory.[116] The award in *Ruxley Electronics and Construction Ltd v Forsyth*[117] ("*Ruxley*") likewise demonstrates that loss is not always measured in purely financial terms. This broader view of loss is likewise consistent with the broad ground of recovery proposed by Lords Goff and Millett in *Alfred McAlpine Construction Ltd v Panatown Ltd*,[118] a view which would be more principled than the narrow ground adopted by the majority and which would resolve the problem of "legal black holes".

30 In the law of tort, it is indisputable that the law compensates for losses other than pecuniary losses. Personal injury, psychiatric harm and injury to reputation are all compensable regardless of whether they result in consequential pecuniary losses. Such awards are incapable of being analysed in restitutionary terms but, provided a sufficiently broad conception of loss is adopted, can be readily understood as compensatory. Lord Scott, writing extra-judicially, provided a particularly lucid defence of such a broad understanding of loss. Against the backdrop of physical injuries and injuries to reputation, his Lordship explained:[119]

116 Robert Stevens, "Damages and the Right to Performance: A *Golden Victory* or Not?" in *Exploring Contract Law* (Jason W Neyers, Richard Bronaugh & Stephen G A Pitel eds) (Hart Publishing, 2009) at p 171. See also Michael Bridge, "The Market Rule of Damages Assessment" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 431.

117 [1996] AC 344.

118 [2001] 1 AC 518.

119 Rt Hon Lord Scott of Foscote, "Damages" [2007] LMCLQ 465 at 466.

> The word 'loss', however, needs amplification. 'Loss' is not to be identified in exclusively pecuniary or material terms. Physical injuries caused by negligence may cause relatively little, if any, pecuniary loss but may involve some physical impairment that constitutes 'loss' by any normal yardstick. The 'loss' must, therefore, be given a monetary value that can be reflected in an award of compensatory damages. The function of the award is still compensation although the quantum of the award may appear arbitrary. Pain and suffering resulting from the physical injuries, even if transitory, represents for the period of the suffering a loss of the normal blessing of a freedom from those things. Damages awarded for the pain and suffering can be recognized as compensatory in intent.
>
> In relation to some torts the nature of the wrongful conduct produces damage that is of an intangible character. Defamation, an obvious example, involves damage to the reputation. A money value must be put on this, and, here again, the valuation of the loss may appear arbitrary, but the purpose of the award is, or should be, compensatory.

It should come as no surprise then that, on such a broad view of loss, his Lordship considers awards made under the user principle as well as *Wrotham Park* damages compensatory rather than restitutionary:[120] "So-called 'restitutionary' damages, too, are in my opinion, best explained as compensatory damages; awarded to compensate for a loss caused by a wrong."[121]

31 Such a broad conception of loss is aligned with Lord Shaw's exhortation to judges in *Watson* to award damages "by the exercise of a sound imagination and the practice of the broad axe".[122] Whilst not the earliest authority on the user principle, *Watson* is perhaps one of the most cited, in part because of his Lordship's colourful exhortation to judicial creativity, and in part because of his Lordship's famous example of the horse and its unauthorised exercise. However, a fuller citation of Lord Shaw's judgment will also demonstrate that his Lordship's conception of the user principle is both consistent with that of Lord Scott's and a broad view of loss. According to his Lordship:[123]

> In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it. In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct

120 Rt Hon Lord Scott of Foscote, "Damages" [2007] LMCLQ 465 at 467–468.

121 Rt Hon Lord Scott of Foscote, "Damages" [2007] LMCLQ 465 at 467.

122 *Watson, Laidlow & Co Ltd v Pott, Casseels and Williamson* (1914) 31 RPC 104 at 117–118.

123 *Watson, Laidlow & Co Ltd v Pott, Casseels and Williamson* (1914) 31 RPC 104 at 117–118.

> appreciation in stated figures. In a second class of cases, restoration being in point of fact difficult, as in the case of loss of reputation, or impossible, as in the case of loss of life, faculty, or limb, the task of restoration under the name of compensation calls into play inference, conjecture, and the like. This is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe. … In patent cases the principle of restoration is in all instances to some extent, and in many instances to the entire extent dependent upon the same principle of restoration.

More specifically, his Lordship says of interferences with property rights:[124]

> [W]herever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle … either of price or hire.

32 It is also notable that this broad conception of loss and compensation is also compatible with a trustee's liability to restore trust assets where they have been misapplied,[125] which again cannot be understood in restitutionary terms.[126]

33 Such awards are now often described as "substitutive". Sometimes used in conjunction with the neutral word "damages",[127] it is also sometimes used in conjunction with the word "compensation".[128] Their substitutive nature is most obvious in the context of *Wrotham Park* damages. It will be recalled that such awards were originally granted in *Wrotham Park* itself pursuant to the power to award damages

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124 *Watson, Laidlow & Co Ltd v Pott, Casseels and Williamson* (1914) 31 RPC 104 at 119.

125 Steven Elliott, "Remoteness Criteria in Equity" (2002) 65 MLR 588. *Cf* Lionel Smith, "The Measurement of Compensation Claims against Trustees and Fiduciaries" in *Exploring Private Law* (Elise Bant & Matthew Harding eds) (Cambridge University Press, 2010) at p 363. See also in this journal Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 and Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884.

126 *Cf Re Dawson* [1966] 2 NSWR 211, where restitution was used to mean restoration.

127 See Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) and Robert Stevens, "Damages and the Right to Performance: A *Golden Victory or Not*?" in *Exploring Contract Law* (Jason W Neyers, Richard Bronaugh & Stephen G A Pitel eds) (Hart Publishing, 2009) at p 171.

128 See Steven Elliott & Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 57 MLR 16 at 24.

in lieu of specific relief under Lord Cairns' Act. When used in conjunction with the word "compensation", substitutive compensation is to be contrasted with reparative compensation. As Cunnington explains:[129]

> [E]tymologically, the word 'compensation' can carry two different meanings: it can mean a monetary equivalent to a right of which a person has been deprived or denied …, which might be labelled 'substitutive compensation'; or it can mean a monetary recompense for loss or damage suffered. This is the much more familiar sense of 'reparative compensation' or 'compensation for loss'.

34 Whilst reparative compensation is subjective, "substitutive compensation is objective, calculated by reference to the objective value of the right of which the claimant has been deprived".[130] Where a market exists, as in cases involving the sale of goods, such awards are derived from the market value,[131] giving the appearance of exactitude in quantification as well as a mirage of subjective loss. Where there is no available market, for example, in cases involving physical injuries, such awards are, as Lord Scott observed, necessarily somewhat arbitrary. Cases involving the user principle and the associated *Wrotham Park* damages straddle these two extremes. Thus, the hypothetical negotiation process undertaken by the court entails certain assumptions that may be utterly false. As Lord Walker observed in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*:[132]

> It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored …

This was the case in *Wrotham Park* itself.

35 The fiction that this process entails has led to the explosion of the myth that the loss in such cases is the loss of an opportunity to bargain.[133] Some proponents of the substitutive award model eschew the

129 Ralph Cunnington, "The Measure and Availability of Gain-based Damages for Breach of Contract" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 215.

130 Ralph Cunnington, "The Measure and Availability of Gain-based Damages for Breach of Contract" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 215.

131 See, *eg*, Michael Bridge, "The Market Rule of Damages Assessment" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 431.

132 [2009] UKPC 45; [2011] 1 WLR 2370 at [49].

133 Robert J Sharpe & Stephen M Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OxJLS 290.

language of loss and compensation altogether but those that do point to a different loss than the lost opportunity to bargain. In the context of the user principle strictly so-called, McInnes describes the award as compensating "for the value of the lost right",[134] departing from the loss of the hypothetical bargain theory. That right is "the right of *dominium* (*ie* the right to control access and use)".[135] While some diehard restitutionary scholars object to the use of the word "lost" in this context:[136]

> … [t]his objection is perhaps overstated. Whilst it is true that the claimant retains her secondary right to damages, it is very often the case that she has lost her primary right to performance of the defendant's obligations. Thus, it is not entirely inappropriate to speak about 'lost rights'.[137]

A more sophisticated analysis describes the loss as a loss of the power to insist on his right by applying to court for *ex ante* injunctive relief,[138] but it is debatable if the analysis possesses greater explanatory force or merely introduces unnecessary complexity. Nor does it "[leave] unexplained those cases where a reasonable fee or disgorgement damages have been awarded for breach of contract, but no relevant proprietary right was infringed".[139] It is understandable for McInnes to refer to the right of *dominium* in his explanation of the user principle as the principle strictly so-called applies exclusively to what may be regarded as property torts. Once accepted, however, the same rationale is easily extended to non-property rights, as can be seen in Stevens' thesis,[140] though he avoids the use of the word "loss".

VII. From a broad axe to a tangled web

36 However, the hypothetical bargain, whilst discredited as a theory of loss, remains treacherous terrain. Both courts and commentators have on occasion become so embroiled in this entirely fictional exercise that they end up with principles so contorted as to

134 Mitchell McInnes, "Gain, Loss and the User Principle" [2006] RLR 76 at 85.
135 Mitchell McInnes, "Gain, Loss and the User Principle" [2006] RLR 76 at 85.
136 Andrew Burrows, "Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 173.
137 Ralph Cunnington, "The Measure and Availability of Gain-based Damages for Breach of Contract" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Hart Publishing, 2008) at p 216.
138 Kit Barker, "'Damages Without Loss': Can Hohfeld Help?" (2014) 34 OxJLS 631.
139 Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart Publishing, 2012) at p 20.
140 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007).

be practically inexplicable. For example, according to Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd*:[141]

> Given that negotiating damages … are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant; but, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account.

In short, courts are not to consider events post-breach except when they choose to do so.

37 A shortlist of no less than 13 principles was collated by HHJ Hacon recently in the case of *Henderson v All Around the World Recordings Ltd*:[142]

> (i) The overriding principle is that the damages are compensatory: see *Attorney-General v Blake* at 298 (Lord Hobhouse of Woodborough, dissenting but not on this point), *Hendrix v PPX* at [26] (Mance LJ, as he then was) and *WWF v World Wrestling* at [56] (Chadwick LJ).
>
> (ii) The primary basis for the assessment is to consider what sum would have [been] arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see *PPX v Hendrix* at [45], *WWF v World Wrestling* at [55], *Lunn v Liverpool* at [25] and *Pell v Bow* at [48]–[49], [51] (Lord Walker of Gestingthorpe).
>
> (iii) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see *Pell v Bow* at [49]
>
> (iv) As a general rule, the assessment is to be made as at the date of the breach: see *Lunn Poly* at [29] and *Pell v Bow* at [50].
>
> (v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see *Pell v Bow* at [51].

141 [2006] EWCA Civ 430; [2006] 2 EGLR 29 at [29].

142 [2014] EWHC 3087 (IPEC) at [18]–[19]. The first six principles were first formulated by Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616; [2012] RPC 29. The remaining seven are supposed to be derived from Newey J's decision in *32Red plc v WHG (International) Ltd* [2013] EWHC 815.

> (vi) The court can take into account other relevant factors, and in particular delay on the part of the claimant in asserting its rights: see *Pell v Bow* at [54] …
>
> (vii) There are limits to the extent to which the court will have regard to the parties' actual attributes when assessing user principle damages. In particular
>
> (a) the parties' financial circumstances are not material;
>
> (b) character traits, such as whether one or other party is easygoing or aggressive, are to be disregarded [29]–[31].
>
> (viii) In contrast, the court must have regard to the circumstances in which the parties were placed at the time of the hypothetical negotiation. The task of the court is to establish the value of the wrongful use to the defendant, not a hypothetical person. The hypothetical negotiation is between the actual parties, assumed to bargain with their respective strengths and weaknesses [32]–[33].
>
> (ix) If the defendant, at the time of the hypothetical negotiation, would have had available a non-infringing course of action, this is a matter which the parties can be expected to have taken into account [34]–[42].
>
> (x) Such an alternative need not have had all the advantages or other attributes of the infringing course of action for it to be relevant to the hypothetical negotiation [42].
>
> (xi) The hypothetical licence relates solely to the right infringed [47]–[50].
>
> (xii) The hypothetical licence is for the period of the defendant's infringement [51]–[52].
>
> (xiii) Matters such as whether the hypothetical licence is exclusive or whether it would contain quality control provisions will depend on the facts and must accord with the realities of the circumstances under which the parties were hypothetically negotiating [56]–[58].

No logical explanation is given as to why the court must have regard to the circumstances in which the parties were placed at the time of the hypothetical negotiation (see (viii)), but that such circumstances do not include the parties' financial circumstances (see (vii)(a)). Principle (iii), from which principle (vii)(b) may have been derived, does not reflect any principled limitations of the judicial process. Rather, it simply reflects the artificiality of the entire hypothetical bargain. It is perhaps for this reason that judicial decisions to include or exclude certain

factors can prove so controversial.[143] When we seek logic in fantasy, we are liable to find confusion rather than clarity.

38 Compared to the comparatively straightforward award for loss of amenity in *Ruxley*, which bears greater resemblance to compensatory awards for personal injuries, one wonders if the courts have lost sight of the forest for the trees. The broad axe recommended by Lord Shaw appears to be on its way to being encrusted by a host of principles designed to constrain the judge, often in ways neither self-evident nor internally consistent. Perhaps it is time to cast off the hypothetical bargain altogether, both as a theory of the loss underlying cases engaging the user principle and as the only means of assessing damages in such cases. As a theory of loss, it has confused an entire generation of legal scholars. As a basis of computing loss, broadly conceived, it risks overcomplicating a fictional process with unnecessary details, both real and imaginary. The courts must be careful not to let a tool devised by them end up constraining them.

VIII. Conclusion

39 Damages awarded on the basis of the user principle have been the subject of bitter dispute for some decades now, a debate borne almost entirely by an excessively narrow conception of loss as pecuniary loss. This dispute is not academic, or at least not academic in its pejorative sense. A restitutionary understanding of such awards may, in certain cases, yield practical differences in result from a compensatory analysis. The debate over its underlying basis should therefore be regarded as yielding dramatic results rather than be viewed as Shakespearean comedy. The key to understanding the debate is that of perspective. In law, unlike in film, however, multiple perspectives do not tell a more engaging story. It tends to lead to confusion. It is thus imperative for us to determine which perspective is correct. This is not obvious if we confine ourselves to cases engaging the user principle. Both the compensatory and the restitutionary perspectives prove plausible on such examination. To better appreciate the appeal of each theory, it is helpful to step outside the category of cases that engage the user principle strictly. The key, it turns out, is a proper understanding of the concept of loss in the common law. Once the similarities between such awards and other awards in contract, tort and trust are appreciated, the allure of the compensatory perspective is irresistible, provided we are prepared to accept that compensation in the law wears two faces, substantive and reparative. The attraction of the restitutionary

143 See, *eg*, some of the criticisms of recent cases in David Llewelyn, "Assessment of Damages in Intellectual Property Cases: Some Recent Examples of 'the Exercise of a Sound Imagination and the Practice of a Broad Axe'?" (2015) 27 SAcLJ 480.

perspective has always rested in large part on an unsustainably narrow conception of loss. Although a restitutionary analysis remains plausible even on such a wider view of loss, it is simply unnecessary since a restitutionary award, where available, can never, as the law currently stands, yield a larger sum than a compensatory award. It is of course true that defendants would be keen on a restitutionary analysis since awards may be smaller on such an enquiry. However, since the decision as to which claim to pursue lies with the plaintiff and not the defendant, it is doubtful that any plaintiff would choose to exclusively pursue a restitutionary award,[144] especially since the common law typically allows a plaintiff to pursue alternative claims. Such a wider perspective also reminds us that not only is the hypothetical bargain unsuitable as a theory of loss, given its fictional nature, but we also ought not to get bogged down by introducing too much complexity to its operation. The user principle was intended to be a broad axe to be wielded in aid of a sound imagination, not a tangled web to constrain the remedial process.

144 *Cf Ministry of Defence v Ashman* [1993] 2 EGLR 102.